No. 16,130

In the

United States Court of Appeals

For the Ninth Circuit

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,
Appellant,

vs.

MARGARET L. GRANT,
Appellee.

Brief of Appellee

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STATEMENT CONCERNING JURISDICTION

Appellant's statement concerning jurisdiction (Appellant's Opening Brief pp. 1-2) is correct and appellee adopts it.

STATEMENT OF THE CASE

This case is governed, as appellant concedes, by California law.

The action was tried on the issues raised by the Second and Third Causes of Action of Appellee's First Amended Complaint and Appellant's Answer thereto (R 25-28; 32-34).

The action is based on a written contract of insurance made between appellant and appellee's former husband, Peter Grant, on August 11, 1954 in Watsonville, California, consisting of a written application and a receipt (Exs 1 & 2; R 244-244D and 245).

Appellee alleges in her Second Cause of Action that appellant had "previously secured from its home office an approval of said contract of insurance for the class, plan and amount of insurance provided for in said contract (R 26). Appellee's Third Cause of Action is identical to the Second except that it omits the above quoted clause. It is based on the theory that home office approval was a condition subsequent so that insurance went into effect prior to such approval.

The trial court found in accordance with the Third Cause of Action and entered judgment for appellee as therein set forth (R 43-45).

As appellant's Statement of the Case omits certain testimony favorable to appellee and sets forth certain testimony favorable to appellant which was controverted or otherwise impeached, appellee will set forth the evidence in chronological order, resolving conflicts in favor of appellee as the trial court did and was entitled to do:

George Price is the agent for the Metropolitan Life Insurance Company in Watsonville, California and vicinity. He has been the agent for that company in that area for about 23 years. During that time, he has engaged in no other occupation and he has been employed by no other company (R 56-57).

Prior to his death on August 13, 1954 (R 107), Peter Grant resided with his wife, Margaret L. Grant (now Margaret L. Kenny) and their two children at 111 Sudden Street, Watsonville, California. He was thirty-five years of age. Peter Grant was employed by Atwood Crop Dusters of Salinas, California, as a crop duster pilot. As such he sprayed and dusted crops and orchards by airplane (R 89-90; Ex 1, R 244). His occupation required him to fly his airplane close to the ground (R 138). Mr. Grant had a $5,000.00 life insurance policy issued to him by Metropolitan

Life Insurance Company on May 1, 1950, before he engaged in crop dusting (R 174; Ex 1, R 244).

On June 8, 1954, Dr. Antone James Sambuck gave Mr. Grant the physical examination required by the Civil Aeronautics Administration. He took Mr. Grant's medical history. Dr. Sambuck found Mr. Grant to be in good physical health. He found no deficiencies in his physical condition. Dr. Sambuck issued a medical certificate to Mr. Grant. Dr. Sambuck was a medical examiner for life insurance companies other than appellant. In his opinion Mr. Grant was a medically standard insurance risk on June 8, 1954. Dr. Sambuck studied Parts B and C of appellant's application for life insurance (Ex 1, R 244). As of June 8, 1954, he would not have noted any derogatory information in respect to Mr. Grant on Parts B and C. Dr. Sambuck knew nothing of appellant's life insurance requirements (R 121-124, 126). Between June 8, 1954, and the date of his death Mr. Grant was ill for one day with a stomach ache and flu. He did not visit a physician between June 8, 1954 and the date of his death. Mr. Grant was in good health on August 10, 11, 12 and 13, 1954 (R 114, 115).

Around the first of June, 1954, Mr. Price called at the Grant home. He introduced himself to Mrs. Grant as the agent for Metropolitan Life Insurance Company; he knew that the Grants had a policy with Metropolitan; he wanted the Grants to know who he was and where they could get hold of him in case they wanted any information. A few days later Mr. Price again called at the Grant home. He asked Mrs. Grant if Mr. Grant was interested in more insurance. Mrs. Grant told him that Mr. Grant, who was not at home, had talked about taking out more insurance and that he should talk to Mr. Grant about it (R 90-91).

Mr. Price saw Mr. and Mrs. Grant toward the end of June, 1954. Mr. Price and Mr. Grant talked about life insur-

ance. Mr. Grant wanted a $10,000.00 policy (R 94, 211). Mr. Grant wanted term insurance. Mr. Price told him he could not buy term insurance because of his occupation. Mr. Price suggested that Mr. Grant buy whole life insurance (R 211-212). At a later date but prior to July 26, 1954, Mr. Price suggested to Mr. Grant that he should buy a family income policy (R 213).

On or about June 28, 1954, Mr. Price met Mr. Grant and took a trial application for a $5,000.00 policy of Whole-Life Paid-up at Age 85 (Ex A, R 250). Mrs. Grant was not present (R 95). The trial application was the same kind of form as Exhibit 1. Mr. Price wrote the word "Trial" on the form.[1] Mr. Price made no marks in the boxes opposite the words "Classification Applied For" in Section 18 of Part A of the form. Mr. Price did not ask for a premium (R 208).

The trial application was sent through appellant's Monterey office to its head office in San Francisco with a letter asking if an application for the described policy could be submitted and "what the extra aviation premium will be" (Exs A and B; R 250, 251). Appellant's Chief Underwriter by letter dated July 6, 1954, requested completion of Form 036 Aer. 6 "giving us full and complete details in regard to the applicant's past, present and future aviation activities" (Ex B; R 251).

Mr. Price saw Mr. and Mrs. Grant on July 14, 1954. Mr. Grant gave Mr. Price more information about his flying and signed an "Aviation Questionnaire" Form 036 Aer. 6 (R 95-96; Ex 5, R 248). Mr. Price suggested a family protection plan of insurance and stated that the premium exclusive of the aviation risk would be approximately $400 for $10,000 insurance (R 96, 97, 199). The Aviation Questionnaire was sent through appellant's Monterey office to its head office in

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1. The trial application is not in the record. It was lost or destroyed by appellant (R 207).

San Francisco (Ex C; R 252). Appellant's Chief Underwriter by letter dated July 20, 1954, quoted the basic extra annual aviation premium per $1,000.00 of insurance (Ex D; R 253). This letter was not shown to the Grants.[2]

On July 26, 1954, appellant's Monterey office requested the head office in San Francisco to give the amount of the extra aviation premium on the term element of the Family Income With Whole Life Paid-up At Age 85 plan (Ex E; R 254). Appellant's Chief Underwriter by letter dated July 30, 1954, referred to appellant's rate book and quoted the basic extra annual aviation premium on the amount of monthly income per $1,000.00 of insurance (Ex. F; R 255).

Mr. Price next saw the Grants on August 5 or 6, 1954 at their home. Mrs. Grant was present during part of the conversation. Mr. Price showed Mr. Grant a paper. Mr. Price informed Mr. Grant that the company would insure him. Mr. Price informed Mr. Grant what the extra aviation premium would be (R 98-99). Mr. Grant wanted more time to consider whether he could afford this insurance (R 99).

During the evening of August 10, 1954, Mr. Price saw Mr. and Mrs. Grant at their home. Mr. Price showed Mr. Grant a letter and said the company would insure him in his business. Mr. Price had a form of application for insurance. He addressed to Mr. Grant the questions in Part A of the application. Mr. Grant answered the questions. Mr. Price wrote those answers on the face of Part A; wrote the date August 11, 1954 and the place. Mr. Grant signed Part A;

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2. Although Price testified on direct that he showed this letter to Grant (R 193) he admitted on cross-examination that he returned it to the Monterey office prior to July 31, 1954 (R 214). The evidence is undisputed that he did not see the Grants between July 14, 1954 and August 5, 1954.

The failure to show this letter to Mr. Grant or appellee is significant because it is the only communication from appellant which could have put them on notice that appellant did not intend insurance coverage to be effective as soon as the premium was paid.

Mr. Price witnessed his signature. Mr. Price filled in and signed that part of the application entitled "To Be Completed by Agent". Mr. Price wrote in the answers, Mr. Grant signed and Mr. Price witnessed the armed forces questionnaire. Mr. Price filled in the Life Inquiry later (R 58-65, 101; Exs 1, 3 and 4; R 244, 246, 247).

The premium was payable monthly (Ex 1, R 244). Mr. Price had his rate books with him. He consulted them. He had in mind the instructions contained in the letter of July 30, 1954 from appellant's head office in respect to the extra premium for the family income benefit on an aviator; likewise the letter of July 20, 1954 from appellant's head office quoting the basic extra annual aviation premium per $1,000.00 of whole life insurance. Mr. Price made computations. He asked Mr. Grant for a check in the sum of $53.36. Mr. Price told the Grants that $53.36 would be the monthly payment (R 101-102, 214-215). As the sum requested by Mr. Price was a bit in excess of his prior estimate, he double checked his calculations (R 102). The instructions to Mr. Price on the application stated "The full first premium must be obtained in advance if payable monthly" (Ex 1, p. 4, R 244D). This form of application is issued whether the premium is payable monthly, quarterly, semi-annually or annually (Ex 1, Item 18; R 244). Mrs. Grant wrote out and Mr. Grant signed a check in the sum of $53.36 drawn on Bank of America National Trust and Savings Association, Watsonville, California, payable to appellant. Mrs. Grant informed her husband and Mr. Price that there was not enough on the check stub balance to make the payment and asked Mr. Price to hold the check one day until they could go to Salinas, withdraw the money from the Atwood Company and put it in the bank. Mr. Price said he would be glad to. On August 10, 1954, the Grants' bank balance was $49.51; on August

11, 1954, $490.00 was deposited in the account and there was sufficient money in the account to pay the check until the account was closed August 20, 1954 (R 103-105). Mr. Grant gave the check to Mr. Price. Mr. Price wrote and gave a receipt to Mr. Grant (R 60-62, 105; Ex 2, R 245). Mr. Price told Mr. Grant that he would have to go to Dr. Blaisdell and have his physical examination; that he couldn't go on Thursday because that was Dr. Blaisdell's day off (R 105-106; 130). Mr. Price did not state when the insurance would be effective (R 106, 129). Mr. and Mrs. Grant assumed that it was in effect when the premium was paid (R 129).[3] Mr. Price took the application with him (R 66).

On August 11, 1954, on the back of the receipt, Mrs. Grant added $53.66 to the monthly premium on the other Metropolitan policy then in force, and thus computed the total monthly outlay which the Grants would have to make for insurance (R 215-216, 218-219).

Mr. Price took the application to Dr. Blaisdell, appellant's medical examiner. He picked it up after Mr. Grant's death and sometime before August 20, 1954, sent it to appellant's Monterey office (R 235).

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3. The pertinent testimony of appellee under cross-examination is as follows:

> "Q. As a matter of fact, Mr. Price never made any representation at any time that you know of as to when insurance would take effect pursuant to this application, is that correct?
>
> A. No, we assumed.
>
> Q. What is that?
>
> A. I assumed that it was in effect when we paid the premium." (R 129)

Appellant claims that appellee's latter answer was a retraction of the former one (Appellant's Opening Brief pp 56-57). It is no such thing; the trial court was entitled to infer that she was talking about herself and her husband in the first answer and that her train of thought was directed into a different channel by counsel's interjection.

On August 12, 1954, Mrs. Grant made an appointment for Mr. Grant to see Dr. Blaisdell on August 13, 1954, at 3:30 in the afternoon (R 107). Prior to 8:30 in the morning of August 13, 1954, Mr. Grant died as the result of an accident which occurred while he was dusting a strawberry field (R 107, 138-139).

During the morning of August 14, 1954, Mr. Price called at the Grant home with another man. The house was full of people. Mrs. Grant was under sedatives. Mr. Price handed Mrs. Grant a check and said "I never put it in the bank. I never deposited it. So the insurance is not in force." Mr. Price asked Mrs. Grant for the receipt (Ex 2, R 245). Mrs. Grant did not know where it was. Mr. Price asked Mrs. Grant to sign some papers. Mrs. Grant said "I don't want to sign anything". Mr. Price said "Well, if you will sign these we will advance you money". Mrs. Grant said "but I don't want to sign anything". Mr. Price left (R 112-113). The paper which Mr. Price wanted Mrs. Grant to sign was a standard release form which appellant required when an agent returned a check or money; it had nothing written on it; if Mrs. Grant had signed it, Mr. Price would have filled it out in front of her. Mr. Price did not produce the form (R 200-201, 207). Mrs. Grant did not return the check to appellant. After Mr. Price's visit on August 14, 1954, no tender was made to appellant of any amount of money on account of the application (R 135). On October 26, 1954, appellant received a written claim for insurance under Exhibit 1 and due proof of death (R 108, 111).

The application provided for a whole life family income policy in the sum of $10,000.00. The beneficiary would receive $10.00 a month for each $1,000.00 of insurance for a period of 20 years from the date of the application; at the end of the 20-year period a lump sum of $10,000.00 would be

paid to the beneficiary (R 66-68, 106; Ex 1, R 244). Margaret L. Grant was named as beneficiary (Ex 1, R 244).

The application contained the following printed matter above the signature of Peter Grant:

> "The foregoing statements and answers are true and complete. It is agreed that: 1. The statements and answers in Part A and Part B of the application for this insurance shall form the basis of the contract of insurance, if one be issued. 2. No agent, medical examiner or any other person, except the President, Vice-Presidents, Actuaries, Treasurers, or Secretaries of the Company, has power on behalf of the Company: (a) to make, modify or discharge any contract of insurance or (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder. 3. No statement made to or by, and no knowledge on the part of any agent, medical examiner or any other person as to any facts pertaining to the applicant shall be considered as having been made to or brought to the knowledge of the Company unless stated in either Part A or Part B of the application for this insurance. 4. The Company shall incur no liability under this application until a policy has been delivered and the full first premium specified in the policy has actually been paid to and accepted by the Company during the lifetime and continued insurability of the applicant, in which case such policy shall be deemed to have taken effect as of the date of issue as recited therein, except as follows: If an amount equal to the full first premium on the policy applied for is paid to and accepted by the Company at the time Part A of this application is signed and if this application is approved at the Company's Home Office for the class, plan and amount of insurance herein applied for, then the insurance in accordance with the terms of the policy applied for shall be in force from the date hereof.
>
> Signed by applicant and dated at Watsonville this 11th day of August 1954."

The receipt signed by Mr. Price and delivered to Mr. Grant read as follows:

"Received from Peter Grant * * * Fifty-Three and 36/100 Dollars, on account of application made this date to the Metropolitan Life Insurance Company. *If the sum collected at the time Part A of this application is signed is at least equal to the full first premium on the policy applied for and if such application is approved at the Company's Home Office for the class, plan, and amount of insurance therein applied for, then the insurance in accordance with the terms of the policy applied for shall be in force from this date,* but otherwise no insurance shall be in force under said application unless and until a policy has been delivered, and the full first premium specified in the policy has actually been paid to and accepted by the Company during the lifetime and continued insurability of the applicant. The above sum shall be refunded if the application is declined or if a policy is issued other than as applied for and is not accepted. If the Company offers, upon payment of the balance of the full first premium, to deliver the policy as applied for, and the offer is refused, the Company will retain from the above sum the costs incurred for medical examination, and will return the balance, if any, upon surrender of this receipt. This receipt is subject to the condition that any check or draft received may be handled for collection in accordance with the practice of the collecting bank or banks, and this receipt shall be void if the full amount of such check or draft is not received by the Company.

Appointment for Medical Examination Aug. 11, 1954
1st small office
Date not Thurs. George I. Price
Dr. Blaisdell—District Monterey"

And on the margin the following:

"If policy is not delivered to you within 60 days from date, this receipt should be presented at the District Office, or the Home Office in New York, for refund."

STATEMENT OF QUESTIONS INVOLVED

1. The basic question is whether on August 13, 1954, the date of Peter Grant's death, a contract of insurance upon his life was in effect.

2. The subsidiary questions are:

a. Under the second cause of action: whether appellant at its home office had approved said contract of insurance on or prior to August 11, 1954 and

b. Under the third cause of action: whether home office approval was a condition precedent to any insurance coverage or, as appellee contends and the trial court found, approval was a condition subsequent; i.e. the applicant was insured upon completing Part A of the application and paying the full first premium, subject to appellant's right to terminate the contract if it became dissatisfied with the risk prior to the issuance of the policy.

ARGUMENT

I. Summary.

Appellee's position, in brief, is as follows:

a. A contract of insurance upon the life of Peter Grant went into effect upon execution of Part A of the Application, and delivery of the full first premium and the receipt. A reasonable layman would regard himself as insured upon payment of the premium; Peter Grant and appellee so regarded themselves. The provision in the Application and the Receipt with reference to home office approval is ambiguous; it can reasonably be construed to be a condition subsequent; the trial court was entitled, indeed compelled, under California law so to construe it. A contrary construction, which would permit the exaction of a premium without affording insurance coverage, is unconscionable and must be rejected under the declared public policy of California.

b. In the alternative, the evidence justifies the conclusion that appellant had approved Peter Grant for the insurance contract here involved prior to the execution of the application.

c. The trial court did not commit reversible error in its findings, conclusions, judgment or the admission or rejection of evidence or at all.

II. Preliminary Observations.

1. The Evidence.

The circumstances surrounding the solicitation of Peter Grant for insurance and the execution of the Application were related by appellee and by George Price, the appellant's agent. The testimony of Price was contradicted by appellee in numerous crucial respects; it was also impeached by his admissions on cross examination which differed radically from his testimony on direct. Thus, for example, he testified on direct that he showed Exhibit D to Peter Grant; but cross examination established that he could not conceivably have done so as he did not see the Grants during the approximately 10 days when that letter was in his possession. He also testified on direct that neither a family-protection type of policy nor insurance in the amount of $10,000.00 was mentioned until just before the application was written but admitted on cross examination that Peter Grant wanted $10,000.00 of insurance from the very beginning and that family protection was discussed long before August 10, 1954. It is clear that the trial court did and was entitled to disbelieve Price's testimony whenever it contradicted the testimony of appellee or an inference reasonably to be drawn from her testimony.

2. Appellant's Theory.

Appellant's basic theory is that the Application and the receipt must be construed as a matter of law to afford an applicant no coverage until the date of subsequent home office approval. Unless this Court adopts this illusory theory of "retroactive immediate coverage," this appeal falls by the wayside.

III. The Applicable Law.

1. Ransom v. Penn Mutual Life Ins. Co. Is the Binding Precedent.

Contrary to appellant's contention, this is not a case of first impression in California. This case is governed by the unanimous California Supreme Court decision in *Ransom v. Penn Mutual Life Ins. Co.*, 43 C.2d 420, 274 P.2d 633 (1954). Because the *Ransom* case is in all material respects on all fours with this case, it is here set forth in detail.

Ralph Ransom made a written application on the insurance company's printed form, paid the first premium in full and received a receipt. The wording of the receipt is not cited in the opinion. The application stipulated for coverage from the date of the application or of the medical exam whichever was later, provided a full first premium was paid at the time of the application and the company was satisfied of Ransom's acceptability under its rules. He was then examined by the company's physician. As the medical information pointed to the possibility of heart disease, the Company was unwilling to approve the risk without further inquiry; it therefore requested Ransom to submit to a further medical examination, but before this could be arranged, he was killed in an automobile accident. The company, having learned of Ransom's death, tendered back the premium to Mrs. Ransom and advised her that in view of

the physician's report, the application was rejected. The Supreme Court found in favor of Ransom, holding that a contract of insurance arose immediately upon receipt by the company of the completed application and the premium payment even though the company had not approved the risk by the date of death and even though the applicant had to perform another act, namely take another medical exam, before the company would consider the risk.

The Court's reasoning was as follows:

a. Language of the Application.

"If the first premium is paid in full in exchange for the attached receipt signed by the Company's agent when this application is signed the insurance shall be in force, subject to the terms and conditions of the policy applied for, from the date of Part I or Part II of this application, whichever is the later, provided the Company shall be satisfied that the Proposed Insured was at that date acceptable under the Company's rules for insurance upon the plan at the rate of premium and for the amount applied for, but that if such first premium is not so paid or if the Company is not satisfied as to such acceptability, no insurance shall be in force until both the first premium is paid in full and the policy is delivered while the health, habits, occupation and other facts relating to the Proposed Insured are the same as described in Part I and Part II of this application and in any amendments thereto."

b. Issue.

"We must determine whether a contract of insurance arose immediately upon receipt by defendant of the completed application with the premium payment, subject to the right of defendant to terminate the agreement if it subsequently concluded that Ransom was not acceptable, or whether, as defendant contends, its satisfaction as to Ransom's acceptability for insurance was a condition precedent to the existence of any contract." (43 C.2d at 423)

c. Condition subsequent. The Court reviewed conflicting out of state decisions and concluded to follow those interpreting the application and receipt so as to effect immediate insurance subject to the right to terminate if the company becomes dissatisfied with the risk before a policy is issued. In other words, the Court construed the condition as a condition subsequent (43 C.2d 423-424). It is clear that the decision did not rest on the specific language of the receipt. Among the cases approved and disapproved appear every conceivable variation and type of receipts, both "if" and "provided", both so called "approval" types and "insurable risk" types. The court simply held that if at all possible, the condition must be construed as subsequent rather than precedent.

d. Ambiguity. There is an ambiguity in the receipt which may lead the ordinary applicant to conclude that he is insured if he pays the premium in advance:

> "An application must be construed as it would be taken by the ordinary applicant, and such a person would assume that he was getting immediate insurance for his money and would not understand that he was left uncovered until the insurer at its leisure approved this risk." (43 C.2d at 424)

and again:

> "The understanding of an ordinary person is the standard which must be used in construing the contract, and such a person upon reading the application would believe that he would secure the benefit of immediate coverage by paying the premium in advance of delivery of the policy". (43 C.2d at 425)

e. Unconscionableness.

> "There is an obvious advantage to the company in obtaining payment of the premium when the application is made, and it would be unconscionable to per-

> mit the company, after using language to induce payment of the premium at that time, to escape the obligation which an ordinary applicant would reasonably believe had been undertaken by the insurer." (43 C.2d at 425)

and again:

> "If the company did not intend that the insurance should be effective from the date of the application it would be obtaining a premium for a period during which there was no insurance, and this would not be dealing honestly with the insured." (43 C.2d at 424)

f. Medical Insurability. The Court expressly held that Ransom's health or medical insurability at the time of the application was irrelevant. A contract, subject to termination, arose at that time; and the only question was whether the Company has communicated a disaffirmance before its obligation became fixed by Ransom's death (43 C.2d at 425).

In short, the Supreme Court held that a contract of insurance arose immediately upon defendant's receipt of the completed application and the payment of the first premium, even though the defendant was at that stage unable to determine whether it would ultimately approve the risk. The decision rested on two independent grounds: (1) the application and receipt were ambiguous and would lead the ordinary applicant to believe he was insured upon paying the premium. The understanding of an ordinary person is the applicable standard. Ambiguities must be construed against the party causing them. If the application lends itself to the construction that the insurance is immediately effective, it must be so construed. (2) It would be unconscionable to permit an insurer, after using language to induce payment of the premium at the time an application is taken, to escape the obligation which the ordinary appli-

cant would reasonably believe had been undertaken by the insurer. Collection of a premium for a period during which no insurance is in effect is not dealing honestly with the applicant. *The insurance company had the alternative of exacting an early premium and affording immediate coverage or refraining from demanding any payment until issuance of the policy.* The Court relied heavily on *Gaunt v. John Hancock Mutual Life Ins. Co.*, 160 F.2d 599 (2 Cir. 1947) in which Judge Learned Hand, speaking for the Court, relied on both ambiguity and unconscionableness and Judge Charles E. Clark in a separate concurrence thought that the decision should be placed squarely on unconscionableness.

The *Ransom* case has been carefully analyzed in 7 Stanford L. Rev. 292 (1955) and this general subject in a comment in 63 Yale L. J. 523 (1954) appropriately headed, in the light of the pre-*Ransom* cases: "the Mystery of the Non-Binding Binder."

2. Appellant's Authorities Are in Conflict with Binding California Law.

In construing binding receipts, two lines of authority have developed. The "majority rule" holds that subjective standards of "approval", "satisfaction" or "acceptability" are conditions precedent to the existence of a contract. The "minority rule" (the modern trend) holds that such standards are conditions subsequent. The *Ransom* case adopts the minority rule. The *Ransom* case is a binding authority. Decisions conflicting with the ratio decidendi as well as with the spirit of the *Ransom* case must be disregarded.

The authorities relied on by appellant cannot be reconciled with the *Ransom* case. The *Hyder, Hutchinson* and *Kammerer* cases strictly construe "binding receipts" in favor of the insurance company. They give no weight to a

provision of a binding receipt which states "insurance shall be in force from this date". Utterly repugnant conditions of "approval", "satisfaction" and the like are preponderated to excise the essence of the receipt: "insurance shall be in force from this date". They give judicial blessing to a practice which permits an insurance company to collect a premium without insuring. The *Ransom* case liberally construes the conditions of such receipts; the *Ransom* case adopts the "understanding of an ordinary person" as the standard of construction; the *Ransom* case gives weight to a provision that states that insurance shall be in effect from a stated date; the *Ransom* case gives weight to a condition of "satisfaction" by construing it as a condition subsequent; the *Ransom* case condemns as "unconscionable" the premium collection practices which appellant asks this Court to approve; the *Ransom* case expressly rejects the "majority rule" of the cases upon which appellant relies. Note that *Ransom* expressly disapproved of *Mofrad v. New York Life Ins. Co.,* 206 Fed. (2) 491 (10th Cir. 1953) relied on by appellant in its Brief.

Nor is this Court free to follow *Corn v. United American Life Ins. Co.,* 104 F. Supp. 612 (DC Colo. 1952). In the first place, the *Corn* receipt was construed so as to make approval and insurability conditions precedent to coverage. That decision therefore joins the numerous cases which the *Ransom* case expressly refused to follow. In the second place, the *Corn* receipt like the *Ransom* receipt dated interim coverage from the completion of Parts I and II of the Application so that the taking of the medical exam was obviously required. There is no such requirement in the Grant receipt or application.

But the real rationale of the *Corn* case is set forth at p 615 of the opinion:

> "Diligent search has failed to reveal a single authority which recognizes the existence of interim insurance where the alleged insured himself had failed to take steps upon which the agreement of the parties conditioned liability."

Two years later, diligent search would have led to the *Ransom* case. There the insurer demanded that the applicant submit to another medical examination—clearly the performance of a further act—before the insurer would consider the acceptability of the risk. Nevertheless, interim coverage was held to be in effect.

Lloyd v. Franklin Life Insurance Company, 245 F.2d 896 (9th Cir 1957), does not aid appellant; in fact, it supports appellee. There the beneficiary expressly requested in the application that the policy be not backdated to the date of the application but should take effect on some subsequent date. He committed suicide within two years of the policy date. The court held that, by express agreement, the parties prevented the backdating of coverage:

> "The mere fact that there was a binding contract on December 11, 1952 did not prevent the parties from postponing coverage and date of issue until January 1, 1953 by express agreement." (245 F.2d at 900)

On p 901 of the Opinion, the Court states that there may very well have been interim coverage from the date of the medical exam (the receipt, as in the *Ransom* case, dated interim coverage from application or medical exam, whichever was later), that such coverage was in addition to the policy (!) but that the beneficiary was not aided thereby as the 2-year suicide exception was contained only in the policy and the policy was not backdated to the medical exam. It is quite clear from the general tenor of the opinion that the Court would not have listened to appellant's contention that there is not such thing as interim coverage under a receipt but that the policy, if and when issued, is merely backdated.

3. Comparison of Ransom and Grant.

In an effort to evade the principle of the *Ransom* case appellant makes a comparison which in effect "imports" certain *Ransom* facts into this case.

a. Appellant notes that in *Ransom* both Part I (comparable to our Part A) and Part II (comparable to our Part B) of the application were completed. The inference is that because Part B of the Grant application was not completed, the *Ransom* rules do not apply. But, of course, a "completed" application for purposes of temporary insurance was one thing in *Ransom* and quite another here.

Under the *Ransom* application *insurance was in force from the date of Part I or of Part II, whichever was later.* Obviously, if both Part I and Part II were not complete there would have been no insurance and no case.

Under the Grant application and receipt, insurance was in force from the date of the receipt; there was no language postponing insurance until Part B or Part C was completed. The receipt stated "Received of Peter Grant Fifty-three & 36/100 Dollars *on account of application made this date* * * *" There was only one application that was or could have been made by Peter Grant at the time the receipt was issued. That was Part A, and that was completed.

b. The *Ransom* application was received at the insurer's home office. Appellant argues that *Ransom* doesn't apply here because the Grant application and premium were not received at appellant's home office. The Court in *Ransom* did not hold that either the application or premium had to be received at the insurer's home office. The court stated that the contract arose "upon the *defendant's receipt* of the completed application and the first premium payment". No reference is made to the "home office". Obviously, "receipt" by an agent would be "receipt" by an insurer.

Finally it is interesting to note that Ransom did not "pass" his medical examination. The insurer was not "satisfied" with the medical report and requested a further medical examination which Ransom never took. The results of the medical examination were immaterial; the evidence of a heart condition was immaterial; Ransom was insured. The taking of a medical examination and the completion of both Part I and Part II were material only because insurance was not in force, by the express terms of the application, until both Parts were complete.

IV. Part A of the Application and the Receipt Effected Immediate Temporary Insurance.

Appellant chooses to ignore what is apparent from a cursory glance at the Application and the Receipt: it is a document having two functions: Part A and the receipt are of themselves a contract of temporary insurance on the life of Peter Grant: with Part B, they constitute an application for a formal policy of insurance on a permanent basis. The receipt was clearly intended to afford coverage prior to execution of the policy, it was, in insurance terminology, a "binder receipt" defined in *Meadows v. Emmett and Chadler,* 86 C.A. 2d 1, 7, 193 P.2d 785 (1948) as

> "a written instrument, used when a policy cannot be immediately issued, to evidence that the insurance coverage attaches at a specified time, and continuing, subject to a maximum limitation, until the policy is issued or the risk is declined and notice thereof given".

Binder receipts in life insurance applications are the rule rather than the exception today. Note, "Binding Receipts" in California, 7 Stan. L. Rev. 292, 293 (1955).

Part A and the Receipt are obviously contractual in nature. They are phrased in contractual terms: "it is agreed

that * * *"; they contain all the elements of an insurance contract: the insurer, the insured, the beneficiary, the premium and the amount and plan of insurance.

The standard of construction is the understanding of an ordinary man. But, at the outset, we propose to demonstrate that even a legal purist, bent on technically examining the facts of this case, would conclude that appellant sold and Peter Grant bought immediate insurance.

1. Neither Part B Nor Part C of the Application Was Part of the Contract of Temporary Insurance, Nor Was Either a Condition Precedent or Otherwise Essential to the Effectiveness of That Contract.

(1) The receipt which was given to Peter Grant, and which is contractual in nature, was detached from Part A. It was delivered coincidentally with the signing of Part A and the delivery of the check. Its delivery was not conditioned upon the completion or signing of Part B or Part C. In short, the format and content of these papers and the acts of the parties establish that a contract was made by them even though Parts B and C were not completed.

(2) Part A provides in part: "It is agreed that: 1. The statements and answers in Part A and Part B of the application for this insurance shall form the basis of the contract of insurance, *if one be issued.* Obviously, this refers to the formal policy of insurance *to be issued:* it does not qualify the contractual nature of Part A and the receipt. The receipt does not refer to Part B or Part C. Had appellant intended that Part A would not be effective until Part B was completed, would not Part A or the receipt provide in effect "Part B must be completed before Part A is effective"? Appellant's careful selection of language in one part dealing with a contract *to be issued* and its failure to use it in another part respecting insurance "in force from this date" shows the duality of Part A: (1) Part A is a contract

of temporary insurance and (2) with Part B, it is an application for a formal policy of insurance on a permanent basis.

(3) The effective date of the insurance was geared solely and expressly to the date of signing Part A. There is no language in Part A, Part B or Part C which either defers or conditions the effectiveness of the insurance until Part B or C is completed. Neither the collection of the premium nor the issuance of the receipt was deferred to or conditioned upon the completion of Part B or Part C. If the temporary insurance obviously provided by Part A was in any way dependent upon the completion of Part B or Part C why was signing of Part A selected as the effective date; why wasn't collection of the premium and the issuance of the receipt deferred until Part B was completed; why didn't Part A or the receipt provide *as in the Ransom case* "the insurance shall be in force from the date Part A or Part B is signed, *whichever is later*"?

(4) The first sentence of the receipt (Plaintiff's Exhibit 2) reads: "Received from Peter Grant Fifty-three and 36/100 Dollars on account of *application made this date* to the Metropolitan Life Insurance Company". The only application that was or could have been made "this date" was the form Part A. Had appellant intended that the application for the purpose of a temporary contract of insurance included Part B or Part C, it would have stated "on account of the application, consisting of Part A, Part B and Part C". Here again the receipt is noteworthy for its omissions; nowhere in that document is Part B or Part C mentioned. In Part A the appellant carefully conjoined Part A and Part B in reference to a contract "to be issued" (i.e. the policy); but in respect to the contract made when Part A was signed and the receipt issued, Part B and Part C were ignored. The omission must have been deliberate. That significant

omission is consistent only with a contract of temporary insurance effective when Part A was signed and the receipt was delivered.

(5) Even though the execution of Parts B and C (the taking of a medical examination) is in no way a condition to the effectiveness of temporary insurance, appellant attempts to graft such a condition into the contract by asserting that Peter Grant and appellee were aware of that nonexistent condition precedent (Appellant's Opening Brief pp 27-29).

The first short answer is that appellee's "awareness" cannot create a condition where none is set forth in the document. The second is that there was no such awareness. It is true of course that both Peter Grant and appellee knew that a medical exam must be taken for "this insurance"; but by "this insurance" they obviously referred to the final issuance of the policy. Appellee's statement does not reflect an awareness that interim coverage would not be afforded. George Price has told them: "the Company will insure you"; they assumed that they were covered when the premium was paid. They knew that they were not insured until the premium was paid. Therefore, Grant made a special trip to Salinas so that there would be funds in his account sufficient to cover the check if it was presented on its due date. Would he conceivably have made a special trip if he had assumed that he was in any event not covered until some indefinite future date? And it is quite significant that when Price asked Grant on August 10 to make an appointment with appellant's physician for the next day, the latter replied that he was too busy (R 72). Grant was too busy to take a medical exam that day in his home town but not to make a special trip to Salinas. *The inference is clear that he knew payment of the premium but not taking of a medical exam to be a condition precedent to interim coverage.* That con-

struction of the receipt would be reasonable not only for a layman but also for a lawyer. Unlike the Ransom receipt which dates interim coverage from "the date of Part I or Part II of this application, whichever is the later", the risk in this case is geared entirely to execution of Part A. Where appellant chose, by the terms of the paper it drew, to undertake the risk from the date of Part A, what difference did it make whether Peter Grant was medically acceptable or unacceptable? That being so, what difference did it make whether a medical examination was taken or whether Parts B or C were completed?

2. Part A of the Application and the Receipt Are Ambiguous; the Ambiguities Must Be Resolved Against the Appellant.

In determining whether home office approval was a condition precedent to interim coverage, the Court must keep in mind the well established California rule that stipulations in an agreement are not to be construed as conditions precedent unless such construction is required by clear, unambiguous language; and particularly so where a forfeiture would be involved or inequitable consequences would result.

Alpha Beta Food Markets v. Retail Clerks, 45 C.2d 764, 771, 291 P.2d 433 (1955);

Brubacker v. Beneficial Life Ins. Co., 130 C.A. 2d 340, 347, 278 P.2d 966 (1955);

Larson v. Thoresen, 116 C.A. 2d 790, 794, 254 P.2d 656 (1955).

And under the *Ransom* case, the contract must, if possible, be construed to afford coverage as soon as the premium is paid because that is how an ordinary applicant would construe it.

The clause in question is rich in ambiguity:

(1) Payment of the premium necessarily had to precede or coincide with the issuance of the receipt. If, as appellant

contends, approval cannot be given until the completed application is received, then approval at the Company's Home Office necessarily had to be subsequent to issuance of the receipt. Even if appellant's president solicited the insurance, gave the receipt and approved the application in Peter Grant's home, the insurance would not be effective, if approval is a condition precedent, because approval did not take place "at the Company's Home Office". *If an act subsequent to the issuance of the receipt—approval at the Company's Home Office—was intended as a condition precedent, how could the insurance be in force from the date of the receipt?* Either the insurance was in force from the date of the receipt and would be paid if death intervened or it was not. There can be no middle ground. If the insurance was not in force when Peter Grant died, the receipt was an instrument of deception; it was a snare for the unwary.

(2) Part A of the application states: The Company shall incur no liability * * * until a policy has been delivered * * * except as follows: If * * * the full first premium * * * is paid * * * *at the time Part A of this application is signed,* and if this application is approved * * * then the insurance * * * shall be in force from the date hereof. By the express terms of the application, payment of the premium is the only thing which must be done at the time Part A is signed for insurance to be in force "from the date hereof." Approval comes later. This is basically identical to the *Ransom* clause which caused the Supreme Court to rule:

> "The clause quoted above is subject to the interpretation that the applicant is offered a choice of either paying his first premium when he signs the application, in which event "the insurance shall be in force * * * from the date * * * of the application", or of paying upon receipt of the policy, in which event "no insurance shall be in force until * * * the policy is delivered."

(3) The fourth line of the receipt states in part "but otherwise no insurance shall be in force under said application unless and until". This statement is a tacit admission that insurance is in force under Part A and the receipt. The question then is: on what date was that insurance in force? The only date mentioned is August 11, 1954. If appellant had intended that insurance would be in force only from the date of Part B or Part C or from the date of approval, then most assuredly that date rather than the date of the receipt would have been stated. If appellant did not intend to insure Peter Grant from the date of the receipt, then there is a clear ambiguity.

(4) The sixth to the eighth lines of the receipt read in part "but otherwise no insurance shall be in force unless and until a policy has been delivered * * * *during the lifetime and continued insurability of the applicant".*

There is but one possible inference from the use of the phrase "during the lifetime * * * of the applicant". *Peter Grant did not have to survive the completion of Part B, the medical examination or approval at the Company's Home Office.* Otherwise, appellant would have written into the third line of the receipt after the phrase "is approved at the Company's Home Office" the words "during the lifetime of the applicant".

The sole implication of the phrase "continued insurability of the applicant" in the eighth line of the receipt is this: appellant assumed that Peter Grant was insurable at the date of the receipt and for immediate payment of the premium, temporarily assumed the risk if he were not. Why is the word "continued" used unless it refers to a condition which appellant assumed existed at the date of the receipt? The word "continued" obviously refers back to the date of the receipt. It obviously encompassses the period from the date of the receipt to the date of approval; its use is pur-

poseless unless it assumes insurability on the date of the receipt.

Each of the cited ambiguities could have been readily corrected by appellant. If the completion of Part B, the taking of a medical examination or approval at the Company's Home Office were a condition precedent to appellant's obligation, each such requirement could have been simply, directly and plainly stated. Thus the receipt could have stated simply that no insurance coverage shall be in effect until the policy is delivered but that upon being delivered, the policy shall for all purposes bear the same date as Part A of the Application. Instead appellant chose the deceptively inconsistent language the "insurance * * * shall be in force from this date". Under such circumstances, should appellant be permitted to blow hot while Peter Grant lived and blow cold when he died?

3. Peter Grant and Appellee Reasonably Believed That Peter Grant Was Insured When He Paid His Premium.

Appellee testified that Mr. Price told her and her husband that the defendant would insure him and that they assumed that the insurance was in effect when the premium was paid. Appellee was an obviously truthful witness; she scrupulously abstained from overswearing. Her understanding, too, would be that of an "ordinary person". On August 10th, 1954, her understanding was not only reasonable but inescapable. Consider the circumstances.

a. Mr. Price made the first approach. For two months, he solicited Peter Grant to take out more insurance. During that time he was armed not only with 20 years of experience and training, but with forms, rate books and letters from the head office.

b. From the beginning, the concern of Mr. Price and the Grants was centered on the question of whether Peter Grant

would be accepted because of his occupation. In fact, that, with the consequent penal premium, was the only issue at all times. A "trial application" was taken. Why take a trial application unless it was contemplated by the parties that insurance would be effective when an application was taken and the premium was paid? If appellant had no liability under the application of August 11, 1954, why indulge in a prior "trial"? With that background any ordinary person would believe that the extra risk for which Peter Grant paid had been accepted and that Peter Grant was insured.

c. Appellant's head office participated in inducing the Grants' belief that Peter Grant was insured. It quoted a penal rate for whole life insurance. That letter was qualified. It was not shown to the Grants. A subsequent letter dated July 30th, 1954 quoted a penal rate on the term element of a family income policy; it referred to the rate book; it was not qualified in any way. That letter was the culmination of extended negotiations, a trial application and an aviation questionnaire. Certainly the Grants would believe that the risk had been approved and that Peter Grant was insured when he paid the penal premium.

d. On August 10th, 1954 Mr. Price did not tell Mr. Grant that he was then insured; on the other hand, Mr. Price did not tell Mr. Grant that he was not insured. Mr. Price took Peter Grant's check and gave him a receipt. Simply stated, that receipt said to the ordinary person "your insurance is in force from this date". Mr. Price did not have to say anything; the receipt said it for him. And Mr. Grant's special trip to Salinas confirms his understanding of the transaction.

e. Mr. Price himself believed that the payment of the premium was the only condition precedent to insurance coverage. When he called on appellee after Peter Grant's death to return the check he stated "I never put it in the

bank. I never deposited it. So the insurance is not in force." What better standard of construction could be had than the agent's own understanding; he was apologizing; Peter Grant was not insured only because Mr. Price did not cash the check.

Under the *Ransom* case, the understanding of a reasonable man is the *legal standard* by which this transaction must be judged. The trial court was entitled, if not compelled, to find that the Grants regarded Peter Grant as insured when he paid the premium; and the record affirms the finding that the Grants were reasonable people. If the Grants were reasonable people, and if they construed approval as a condition subsequent, then under the applicable legal standard the application and receipt must be construed as affording immediate coverage.

4. The Trial Court Took Testimony to Construe the Contract; Its Construction Is Binding Upon This Court.

Appellant's contention to the contrary notwithstanding, (Appellant's Opening Brief p 48) the trial court did determine that Part A of the Application and the Receipt were ambiguous. That Court's opinion stated that there was little difference between this case and the *Ransom* case (R 37); the *Ransom* decision rests primarily on ambiguity. The trial court found that the Grants reasonably construed the Application and the Receipt as affording immediate coverage (Finding No. IX, R 40) and concluded that home office approval was a condition subsequent (Conclusion No. II, R 41-42). The Receipt does not say so in so many words and the Court spoke of a "reasonable" construction rather than a "necessary" construction. The trial court's findings reflect its view that the Receipt was ambiguous, and that, consistent with the rules of interpretation laid down in the *Ransom* case, the Receipt lent itself to the interpretation set forth in the Findings and Conclusions.

While the question whether a contract is ambiguous is in the first instance a question of law, the resolution of the ambiguity becomes a question of fact where evidence is introduced to explain it. In that event, the trial court's interpretation binds an appellate court unless it is clearly erreoneous.

Dept. of Water v. Okonite-Callender Cable Co., 181 F.2d 375, 380 (9th Cir 1950);

Walsh v. Walsh, 18 C.2d 439, 443-4, 116 P.2d 62 (1940).

The trial court was enjoined by the *Ransom* case to ascertain how a reasonable man would construe the contract and the Court took evidence to ascertain the intent of the parties. It learned that the Grants assumed that they were insured when they paid the premium; that Price had said: "The company will insure you" without adding: "at some remote future date"; it learned of the extensive prior negotiations leading to the resolution of the only real issue, namely, the acceptance of the aviation risk; it learned of the special trip to Salinas and of Price's remark, when returning the check after Grant's death, that only his failure to cash the check precluded coverage.

In the light of the patent ambiguity in the receipt and the trial court's reasonable construction based in part on extrinsic evidence, its conclusion that home office approval was a condition subsequent is binding upon this Court.

5. Appellant's Construction of the Application Is Unconscionable.

(1) Peter Grant contracted to leave his money with appellant for 60 days:

> "If the policy is not delivered to you within 60 days from date, this receipt should be presented at the District Office or the Home Office in New York, for refund". (Ex 2; R 245)

This was interest free money in the hands of appellant, which was of real value. If Peter Grant was not insured when he paid his money and got his receipt, appellant sold him something that was utterly valueless. And it doesn't make any difference whether the insurance was deferred for a few days until Part B was completed, or eight weeks until the Home Office acted. Peter Grant was deceived; he bought a "pig in the poke"; and he was unquestionably induced by appellant's agent, by appellant's papers, by appellant's words "insurance * * * shall be in force from this date". To sum up the matter with judicial nicety we turn to *Stonsz v. Equitable Life Assurance Society,* 324 Pa. 97, 187 Atl. 403, 406 (1936); (cited with approval in the *Ransom* case):

> "If there was to be no contract of insurance in any event until the application was approved * * * and a policy issued thereon, it would seem entirely immaterial to the insured whether the contract related back to the date of the application or not. If he lived until the application was approved and a policy issued, it would seem a matter of indifference to him whether he had been insured during the interim between the date of the application and the date of the issuance of the policy. On the other hand, if he died before the application was approved and the policy issued, his beneficiary would derive no benefit from the insurance. The chief object of the provision would, therefore, seem to be to enable the insurance company to collect premiums for a period during which there was in fact no insurance, and consequently no risk."

Under the *Ransom* case, appellant cannot escape responsibility merely by pleading there is no ambiguity; it must go further and justify its business practice:

> "* * * There is an obvious advantage to the company in obtaining payment of the premium when the application is made, and it would be *unconscionable* to permit

the company after using language to induce payment of the premium at that time to escape the obligation which an ordinary applicant would reasonably believe had been undertaken by the insurer * * *" *Ransom v. Penn Mutual Life Ins. Co.* (43 Cal. (2) 420, 425)

In *Western & Southern Life Ins. Co. v. Vale,* 12 N.E. (2) 350, 354 (Ind 1938) (cited with approval in the *Ransom* case) the Court stated:

"* * * In other words, it is recognized that such a receipt is calculated to convey the impression to the applicant for insurance that he is insured, and to procure money from him as a premium for insurance over a period when he is not insured by law. Put otherwise, it means that, by a device calculated to deceive, the applicant is *defrauded* out of so much of the premium paid as would provide insurance for the period between the application and the acceptance and delivery of the policy * * *"

In *Albers v. Security Mut. Life Ins. Co.,* 170 N.W. 159, 160 (S.D. 1918) (cited with approval in the *Ransom* case) the Court stated:

"* * * If the company did not intend that there should be insurance effective pending the date of the application and the date of the approval of the risk and the issuance of the policy, then the company would be charging and obtaining the full amount of the premium for one year, while the period of actual insurance would be as many days less than one year as there were days intervening between the date of the application and the approval. *This would not be dealing honestly with the insured.* By the payment of the premium for one year an insured is entitled to insurance for one year * * *"

In *Gaunt v. John Hancock Mut. Life Ins. Co.,* 160 F.2d 599, 601 (2d Cir 1947) (cited with approval in the *Ransom* case) the Court stated:

"* * * An underwriter might so understand the phrase, when read in its context, but the application was not to be submitted to underwriters; it was to go to persons utterly unacquainted with the niceties of life insurance, who would read it colloquially. It is the understanding of such persons that counts; and not one in a hundred would suppose that he would be covered, not "as of the date of completion of Part B", as the defendant promised, but only as of the date of approval. Had that been what the defendant meant, certainly it was easy to say so; and had it in addition meant to make the policy retroactive for some purposes, certainly it was easy to say that too. To demand that persons wholly unfamiliar with insurance shall spell all this out in the very teeth of the language used, is *unpardonable* * * *"

But, argues appellant, an insured derives certain benefits from the backdating of the policy to the date of the application which justify the exaction of a premium in the interim without affording coverage (Appellant's Opening Brief, pp. 34-35). An identical argument was made in the Second Circuit and persuasively rejected by Judge Learned Hand in the *Gaunt* case, supra at 601. These benefits may constitute a peppercorn of consideration but they are not the consideration bargained for. The applicant is not getting the one thing he is paying for—insurance.

Daily, throughout this country, appellant is collecting thousands of dollars in premiums paid by applicants; appellant gives the applicant a receipt which states "* * * insurance * * * shall be in force from the date hereof"; if the applicant lives, the policy is dated back to the date of the receipt; if the applicant dies prior to approval of the application, appellant disclaims liability. In essence, appellant is collecting a premium for a period when, according to its view, there is no insurance in force. Essentially, appellant has placed in the hands of its salesmen a "selling device"

to induce the innocent to buy while covertly relying on legalisms and lawyers to protect it against its own "device" and its own agents. This is a paper version of the ancient "shell game": now you have insurance; now you don't.

And appellant's reliance on California Insurance Code § 10115 to justify its business practice is misplaced (Appellant's Opening Brief, pp. 43-45). To suggest that under that section insurance cannot be enforced prior to home office approval is a gross distortion. That section is a restraint on insurers, not a shield to protect them. It does not preclude an insurer from contractually assuming a liability prior to approval. This was conclusively established by the *Ransom* case which imposed liability before the company had approved the risk.

Nor does that section evidence the legislative policy as to what constitutes fair dealing. True, that section permits the issuance of a contract under which coverage may be made contingent on approval of the risk. But the conditions under which such a contract will be sustained are set forth in the *Ransom* case: the application must unequivocally apprise the applicant that protection is deferred; any ambiguity which reasonably leads an applicant to believe that he is immediately protected would transmute an approval clause into a condition subsequent.

6. The Full First Premium Was Paid.

George Price requested Peter Grant to pay the sum of $53.36 and stated that it was the full monthly premium. He computed that extremely high premium on the basis of appellant's rate book and the letters of instruction he had received. He double checked his figures. Out of an abundance of caution, he assigned to Grant an "intermediate" rather than an "ordinary" rating. He entered in the application that the premium was to be payable monthly. He

acted under written instructions contained in the application itself that: "the full first premium must be obtained in advance if payable monthly." He thus was not only authorized but required by appellant's rules to advise the applicant of the amount of the premium. Therefore, his representation to the applicant, whether correct or not, is binding on appellant.

Price gave to Grant a receipt stating "Received the sum of $53.36 * * *" On the date of the check, the receipt and the application, there were sufficient funds in Grant's bank account so that the check would have been honored. The check could have been cashed on its due date or on the next day. Appellant's failure to cash it may not be blamed on appellee.

Appellant complains of the failure to find that the check was returned after Peter Grant's death and that appellee made no subsequent tender of payment. Such a finding would have been immaterial. Appellant had the right to terminate the contract subsequent to August 11, 1954 but during Grant's lifetime. It did not do so. In the absence of such communication of termination, appellant's obligations became fixed by Grant's death. A subsequent return of the check cannot relieve appellant of its obligation.

And under the circumstances obtaining the day after Mr. Grant's death, no inference that appellee waived her rights can be drawn from her taking the check. The trial court was the best judge of that:

> "While Grant's wife was under a doctor's care, the agent, having learned of the death of Grant, and said agent still having the check in his possession, rushed to the home of the Plaintiff, left the check and tried to get her to sign a receipt, which she refused to do. It appears from the evidence that she was in no physical condition to transact any business whatever. I will not

comment on this action by the agent except to ignore it as it is not material here." (Opinion of the trial court, R 36)

When appellant returned the check and unequivocally disclaimed liability, no further tender was necessary as it would have been futile.

Hossom v. City of Long Beach, 83 C.A. 2d 745, 750, 189 P.2d 787 (1948);

Cowan v. Tremble, 111 C.A. 458, 464-5, 296 P. 91 (1931);

Passow v. Harris, 29 C.A. 559, 562-3, 156 P. 997 (1916).

7. The Trial Court's Decision Is Based on Its Interpretation of State Law and Therefore Should Be Given Great Weight.

It is quite clear from the trial court's Opinion and the general tenor of the Findings of Fact and Conclusions of Law that that court regarded itself as bound by the *Ransom* case; it viewed *Ransom* as proclaiming the California rule that it would be unconscionable to deprive an insurance applicant of interim coverage pending home office approval where the receipt would reasonably lead him to believe that he was insured from the date of the premium payment. Under such circumstances, federal appellate courts have frequently held that they will not reverse a trial judge who has reached a permissible conclusion as to a doubtful question of state law.

Steele v. General Mills, 329 U.S. 433, 439, 67 S. Ct. 439, 91 L.Ed. 402 (1947);

Chicago & N. W. RR. Co. v. Bork, 223 F.2d 652, 657 (8th Cir 1955);

Western Auto Supply v. Sullivan, 210 F.2d 36, 43 (8th Cir 1954);

Heikes v. N. Y. Life Ins. Co., 171 F.2d 460, 464 (8th Cir 1948).

Upon the foregoing grounds, it is submitted that Conclusion No. II (R 41-42), the determinative conclusion, is correct in law and that Findings Nos. VIII and IX, the determinative Findings, are amply sustained by the evidence.

V. The Court Can Find That Peter Grant Was Approved.

Neither "approval" nor proof of approval requires a document stating "we approve". Approval can be inferred from the evidence. The circumstances preponderate in favor of that inference.

No printed limitations on the authority of appellant's agent can assist appellant. Its home office directly participated in the negotiations with Peter Grant.

By July 30, 1954, the home office was fully informed through the trial application, the aviation questionnaire and correspondence about Peter Grant, his occupation and the plan of insurance desired. Though Price knew from the very inception of negotiations that Grant wanted $10,000.00 of insurance we do not know whether that fact was communicated to the home office. But the Court can easily infer that the amount would make no difference. Exhibits D and F (R 253 and 255), set forth the extra premium for aviation and the family protection feature *per $1000.00 of insurance.* The agent was thus instructed to make the identical computation regardless of whether insurance in the sum of $2,000.00 or $10,000.00 was sought.

With regard to Grant's health, the home office knew that he was a commercial pilot by occupation (Ex 5; R 248); it therefore was charged with knowledge and undoubtedly knew that he was required by law to take periodic physical

examinations at least as rigorous as appellant's insurance examination and that he would have violated the law had he flown while not in excellent health. (Code of Federal Regulations, Title 14, Part 43, §§ 43.41 and 43.42; Ex 1; R 244)

Admittedly, appellant was not prepared to approve Peter Grant as of July 20, 1954 (Ex D; R 253). But twenty days elapsed between that date and the date of the application. The subsequent letter of July 30, 1954 (Ex F; R 255) contained no language of condition or reservation. Thereafter, Price told the Grants that the company will insure Peter Grant. While Price had no authority to make a contract for appellant, he certainly had authority to communicate to the applicant the home office's decision; in fact, he is the logical medium through whom approval would be communicated, and his statement is sufficient evidence to establish such approval.

The trial court made no finding on the issue tendered by plaintiff's second cause of action that appellant had approved Peter Grant prior to August 11, 1954 as to the plan, class and amount of insurance provided in the contract. It merely found that it had so approved him as to his business (Finding No. VII; R 39-40) and that it had fully informed itself of his needs for insurance and of the factors bearing upon his acceptability as an insurance risk (Finding No. V; R 39)

The law is clear that an appellate court is required to sustain a judgment upon any theory which is supported by the evidence regardless of whether or not the trial court addressed itself to that theory.

Jaffke v. Dunham, 352 US 280, 281, 77 S. Ct. 307, 16 L.Ed. 2d 314 (1957);

American Surety Co. of N. Y. v. Brummel, 184 F.2d 935, 936 (10th Cir. 1950);

McBrine Co. v. Silverman, 121 F.2d 181, 182 (9th Cir. 1932);

Yangtze Co. v. Deutsch-Asiatische Bank, 59 F.2d 8, 12 (9th Cir 1932);

McCloskey v. Pac. Coast Co., 160 F. 794, 801 (9th Cir 1908).

VI. No Prejudicial Error Was Committed in Evidentiary Rulings or in the Findings.

Only Appellant's Specifications of Error Nos. 6, 9 (last sentence of Finding No. IX as being a conclusion), 12, 22, 23 and 24 remain for consideration.

1. Peter Grant Was at All Relevant Times in Good Health; Finding of Fact No. VI Is Proper and Sustained by Admissible Evidence.

On June 8, 1954, Dr. Sambuck subjected Peter Grant to a medical examination at least as thorough and complete in every particular as appellant's insurance examination. He found Grant to be in good health[4] and would have noted no derogatory information on Parts B and C of Exhibit 1.

Appellant's motion to strike Dr. Sambuck's testimony was taken under advisement by the trial court; and as the motion was not renewed, it is deemed waived.

Paramount Productions v. Smith, 91 F.2d 863, 866 (9th Cir. 1937);

Clauson v. U.S., 60 F.2d 694, 695-6 (8th Cir. 1932);

Ewert v. Thompson, 281 F. 449, 452 (8th Cir. 1922);

D'Avanzo v. Manno, 16 C.A. 2d 346, 348, 60 P.2d 524 (1936).

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4. In a characteristic distortion of the evidence, appellant states that Dr. Sambuck's Medical Certificate shows a "physical deficiency" (Appellant's Opening Brief p. 59). Actually, what the Certificate states is the following: "Holder shall wear correcting lenses while exercising privileges of his airmans certificate." (R 249)

Between June 8, 1954 and the date of his death, Grant did not visit a physician; he was ill only one day with a stomach ache and the flu. Appellee testified that her husband was in good health on August 10, 11, 12 and 13, 1954. Grant was piloting an airplane immediately prior to his death. He would have violated the law had he so flown while not in good health. The presumption is that he obeyed the law. Cal. Civil Code § 1963(1)(33). A presumption is evidence in California sufficient to sustain a finding. *Abrams v. Stone,* 154 C.A. 2d 33, 39, 315 P.2d 453 (1957). Finding of Fact No. VI is amply supported by the evidence.

While the *Ransom* decision rests on the court's conclusion that Ransom's medical insurability was irrelevant to interim coverage, the opinion does state that he was in fact in good health. In the case at bar, if this Court concurs in the trial court's conclusion that approval of the risk must be viewed as a condition subsequent, Grant's health was immaterial. Appellee introduced evidence on this subject, however, out of an abundance of caution and to show that appellant did not saddle itself with an uninsurable risk. It is completely beyond doubt that Grant did not die of sickness or medical disability of any sort.

At worst, the above Finding and evidence are immaterial. The presumption, of course, is that the trial court's judgment is based only on proper evidence and that the court ignored improperly admitted testimony.

> *Ferguson v. Post,* 243 F.2d 144, 145 (2d Cir. 1957);
> *Morris v. Williams,* 149 F.2d 703, 708 (8th Cir. 1945);
> *MacDonnell v. Capital Co.,* 130 F.2d 311, 318 (9th Cir. 1942).

An irrelevant or unnecessary finding will also be ignored if the judgment is otherwise sustained by sufficient findings based on proper evidence.

J. P. Gibbons, Inc. v. Utah Home Fire Ins. Co., 202 F.2d 469, 474 (10th Cir. 1953).

In order to sustain this judgment, it is merely necessary for this Court to conclude that the trial court's Findings Nos. VIII and IX are sustained by the evidence.

2. No Prejudicial Error Was Committed in the Exclusion of Evidence.

Appellant assigns as error the action of the trial court in striking Mr. Svendsen's answer: "That is right" to the question "If that application had been completed would it have come to your division?" (Specification of Error No. 23) and the court's further action in striking his answer: "Yes sir" to the question: "Does the weight of an applicant, Mr. Svendsen, have anything to do with the classification?" (Specification No. 24) Neither ruling was prejudicial.

In the first place, if this Court concurs in the trial court's determination that approval was a condition subsequent, neither Specification No. 23 nor Specification No. 24 is reached. The mechanics of approval and the factors bearing on medical classification are obviously irrelevant; the only issue is whether appellant had communicated its termination of the contract prior to Peter Grant's death; and that issue is resolved by Finding of Fact No. X (R 40, 41) and the uncontradicted evidence.

Even if approval were a condition precedent, the exclusion of the testimony set forth in Specification No. 23 is not prejudicial. Appellant's District Manager Wigham testified that the application was not completed (R 164, 165), and that after an application is completed it goes directly to the San Francisco head office (R 166). It was stipulated that the application was still at appellant's examining physician's office at the time of Peter Grant's death (R 235). And the entire correspondence between appellant's district and head

offices, especially Exs B, D & F (R 251, 253, 255), makes clear that Svendsen was the home office man in charge of this case. Thus, the excluded testimony was merely cumulative and its exclusion was not prejudicial.

Larimer v. Smith, 130 C.A. 98, 104, 19 P.2d 825 (1933);

Silvery v. Harn, 120 C.A. 561, 573, 8 P.2d 570 (1932).

The evidence set forth in Specification No. 24 is obviously incompetent and irrelevant. Note that the question addressed itself not to insurability but merely to classification. The only possible relevance of that question goes to the amount of the premium. In the first place, though the evidence showed Peter Grant to have been healthy and not obese, Price computed the premium on the basis of an "intermediate" and not an "ordinary" classification. And as Price was not only authorized but instructed to communicate and demand the full premium, his determination is binding on appellant and may not be contradicted by an admittedly uncommunicated computation. Moreover, weight classifications are set forth in the rate book so that Svendsen's testimony would not be the best evidence and therefore incompetent.

3. Listing Findings Among the Conclusions or Vice Versa Is Not Determinative.

Appellant objects to the use of the word "contract" in Findings Nos. II, X and XII (R 38, 40, 41) and contends that the last sentence of Finding No. IX (R 40) is a Conclusion of Law.

As previously shown, the establishment of a contract, where testimony is introduced for purposes of interpretation, tenders an issue of fact. Also, the reasonableness of the Grants' construction of the contract is in our opinion an ultimate fact.

At any rate, in view of the shady line of demarcation between an ultimate fact and a conclusion, it has always been the law that the courts will look to the real nature of the statement, regardless of whether it is placed among the findings or the conclusions.

Benrose Fabrics Co. v. Rosenstein, 183 F.2d 355, 357 (7th Cir. 1950);

Linberg v. Santo, 211 C. 771, 776, 297 Pac. 9 (1931);

Gossman v. Gossman, 52 C.A. 2d 184, 191, 126 P.2d 178 (1942).

Even if all of the above statements are conclusions, the trial court made ultimate findings more than sufficient to sustain the judgment.

CONCLUSION

The law of California as laid down in the *Ransom* case and as applicable to this case does not impose any harsh or unreasonable hardships upon the insurance carrier. The risk assumed by the collection of a premium to cover the period prior to approval or rejection is a statistically small one; the chances are slight, indeed, that an applicant is (a) uninsurable and (b) will die during the relatively short interval between the taking and the approval or rejection of the application. That risk is voluntarily and contractually assumed. The insurer need not assume it; if he wishes to avoid this small risk, he need merely refrain from collecting a premium before he is prepared to issue a policy. The premium paid for the interim period is a substantial one; the insurer insists on exacting it in every instance and manifestly derives a considerable benefit from it. The applicant regards himself as insured when he pays the premium; such immediate insurance is the only consideration bargained for, it is the only promised benefit which

induces him to part with his money. We invite the Court to speculate as to how many advance premiums would be collected if soliciting agents would frankly inform applicants that they are not insured until approval and that they receive nothing for their money but certain ephemeral benefits which are intelligible and persuasive, in Judge Learned Hand's words, only to the underwriting craft.

Peter Grant paid an advance premium in reliance on immediate coverage. Appellant solicited, in fact, demanded that premium. It is beyond question that the application would have been approved but for Grant's untimely accidental death. That precise risk was undertaken by appellant for good and sufficient consideration. Having accepted the benefits of its bargain, appellant may not now unconscionably disaffirm its obligation.

The trial court so ruled; and its decision is buttressed by sufficient findings based on substantial evidence and is correct in law.

Appellee respectfully submits that the judgment should be affirmed.

Dated: March 16, 1959.

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